IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JEFFREY LEE GRAY, et al.,	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 7:04-CV-00634**
	)	
GENE JOHNSON, et al.,	)	**By: Michael F. Urbanski**
Defendants.	)	**United States Magistrate Judge**

REPORT AND RECOMMENDATION

Plaintiffs Jeffrey Lee Gray, John A. Martin, Thomas W. Bozga, and Michael E. Francis, Virginia inmates currently proceeding pro se, have filed a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiffs allege that defendants violated their constitutional rights by requiring participation in religious aspects of the Therapeutic Community Program ("TC Program") at Botetourt Correctional Center ("BCC"). Defendants Johnson, Terry, Crowder-Austin, Martin, Daniel, Bass, Parker, Bush, Wareham and Suttle are all employed by the Virginia Department of Corrections ("VDOC") at various levels, from clinical social worker to the department director.

This matter is before the undersigned for report and recommendation on defendants' motion for summary judgment. Having reviewed defendants' motion and other materials in the record, it is the recommendation of the undersigned that the motion be granted.[1] Taking into

[1] Plaintiffs Bozga and Martin recently filed a Motion for Leave to File an Amended Complaint and a Proposed Amended Complaint. Consideration of the amended complaint does not change any substantive analysis of this report and recommendation. It is recommended, therefore, that plaintiffs Bozga and Martin's Motion for Leave to File an Amended Complaint be denied, as filing would be futile. Foman v. Davis, 371 U.S. 178, 182 (1962) (leave to amend should be freely given in the absence of any apparent reason including futility); New Beckley Mining Corp. v. Int'l Union, United Mine Workers of America, 18 F.3d 1161, 1164 (4th 1994); Davis v. Piper Aircraft Corp., 615 F.2d 606, 613-14 (4th Cir. 1980).

account all facts as alleged by plaintiffs, there is no material issue of fact in this case as to plaintiffs' claimed constitutional violations. The policy of VDOC as implemented at BCC does not violate plaintiffs' First Amendment rights. Defendants have taken substantial steps to remove religious components from the TC Program at BCC, and any reference to God that may be made is merely incidental and does not violate the Establishment Clause. Furthermore, defendants cannot be held liable for monetary damages under the doctrine of qualified immunity.

I

Plaintiffs are in the custody of the Virginia Department of Corrections and were, at the time this action arose, housed at the Botetourt Correctional Center and participating in the Therapeutic Community Program. The TC Program is an intensive, long-term treatment program for substance abusing offenders. Crowder-Austin Aff. ¶ 3. The program targets inmates with a history of substance abuse who can benefit from improved socialization. Id. In this highly structured program, inmates must actively participate in group meetings and encourage others to do so, abide by group rules, and with the approval and authority of staff, hold each other accountable for their actions. Id. at 4; Bush Aff. ¶ 5, Terry Aff. ¶ 3. Inmates who meet the criteria of the TC Program but who refuse to participate or are removed for unsatisfactory participation lose all of their good conduct allowances and will not be allowed to subsequently earn good conduct time. Plaintiff's Brief in Opposition to Defendants' Summary Judgment Motion [hereinafter Pls.'s Br.] ex. 6.; see also Va. Code Ann. § 53.1-32.1.

In Nusbaum v. Terrangi, 210 F. Supp. 2d 784 (E.D. Va. 2002), the court found that the Therapeutic Community Program at the Indian Creek Correctional Center ("ICCC") violated the

Establishment Clause of the First Amendment because plaintiffs were required to participate in a program that espoused religion. Id. at 789. As a result of this ruling, VDOC Division of Administration and Programs Deputy Director John Jabe circulated a memorandum on September 3, 2002 to correctional facilities that house TC Programs. Terry Aff. ¶ 4. The memorandum advised VDOC facilities to take immediate action to delete all religious aspects from the mandatory portions of TC programs, with full compliance expected by December 31, 2002. Terry Aff. ex. A.

In response to this court ruling and resulting memorandum, the TC Program staff at BCC worked to exclude religious references from mandatory components of the program, as outlined in the September 3, 2002 memorandum. Crowder-Austin Aff. ¶ 7; Terry Aff. ¶ 4. For example, the Alcoholics Anonymous ("AA") component of the program was removed, two separate library areas were established (one containing religious materials and one without religious materials), and motivational readings were amended. Crowder-Austin Aff. ¶ 7. However, the memorandum instructed staff not to prohibit individual inmates from expressing their own religious views unless it amounts to proselytizing. Id.; see also Terry Aff. ex. A.

Plaintiffs claim that all aspects of religion were not in fact erased from the mandatory components of the TC Program subsequent to the Nusbaum ruling. Plaintiff's Declaration in Opposition To Defendants' Motion for Summary Judgment [hereinafter Pls.' Decl.] 4. Plaintiffs state the TC Program as administered at BCC espouses religion by using the terms "God" and "higher power" in required portions of the program. Defs.' Mem. Support Summ. J. 1. In support of its brief in opposition to defendants' summary judgment motion, plaintiffs filed affidavits from a number of inmates who cite specific instances of religious involvement in

mandatory activities.

Inmates contend they were unable to leave the dorm during meetings in which staff members announced religious components would be present. Blakenship Aff. ¶ 2; Cooper Aff. ¶ 1; Horn Aff. 2 ¶ 2. Plaintiffs indicate one inmate sang a gospel song at a talent show. See Pls.' Decl. 4; see also Hairston Aff.; Jones Aff.; Martin Aff. 2; Smith Aff. Plaintiffs allege that on many occasions, other inmates in meetings talked about religion and gave their understanding of religion. Pls.' Decl. 4.

To buttress these claims of religious involvement in mandatory meetings and activities, plaintiffs point to the decline of the program in the fall of 2004 and the subsequent overhaul of the program in the spring of 2005. Pls.' Decl. 3. They assert the program became a virtual disaster due to the number of inmates who refused to participate in the program, and insinuate religion was the cause. Pls.' Br. 4. Finally, plaintiffs claim that staff was absent from many meetings and left inmates in "leadership" positions in charge, whereby staff would not have knowledge of whether religion was espoused in such meetings. Pls.' Decl. 5. Plaintiffs state that defendants, by requiring participation in components of the program that may still mention God or religion, have violated their constitutional right under the First Amendment.

Defendants move for summary judgment on a number of grounds. Defendants assert that the TC Program does not violate the Establishment Clause of the First Amendment because all religious aspects have been removed from the mandatory components of the program, although religious materials are still available if inmates choose to access them. Defs.' Mem. Supp. Summ. J. 6. Defendants assert they draw a line between permitting an inmate to express his beliefs and prohibiting the inmate from proselytizing. Id. at 7. Thus, the element of coercion is

lacking in plaintiff's Establishment Clause claim. Id. at 7.

Defendants state claims against Bass, Johnson, Daniel and Parker must be dismissed because 42 U.S.C. § 1983 does not support a claim of liability based on respondeat superior. Defs.' Mem. Supp. Summ. J. 5. Defendants also move to dismiss the claim against defendant Wareham on the grounds that no defendant has suffered any injury traceable to Wareham. Id. at 8. Finally, defendants claim qualified immunity prevents plaintiffs from recovering any monetary damages in this case. Id. at 8.

As plaintiffs Bozga and Martin have filed a response to defendants' motion for summary judgment, this case is ripe for adjudication.[2]

II

Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Upon motion for summary judgment, the court must view the facts, and the inferences to be drawn from those facts, in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Rule 56(c) mandates entry of summary judgment against a party who "after adequate time for discovery and upon motion . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex v. Catrett, 477 U.S. 317, 322 (1986). A genuine issue of material fact exists if a reasonable jury could return a verdict for the nonmoving party.

[2] Defendants collectively filed a motion for summary judgment in this action. Only plaintiffs John Martin and Thomas Bozga filed a response to defendants' motion for summary judgment. As two plaintiffs have responded and two have failed to respond within the court's time frame, this matter is ripe for adjudication.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

Ordinarily, a prisoner proceeding pro se in an action filed under § 1983 may rely on the detailed factual allegations in his verified pleadings in order to withstand a motion for summary judgment by the defendants that is supported by affidavits containing a conflicting version of the facts. Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979). Thus, a pro se plaintiff's failure to file an opposing affidavit is not always necessary to withstand summary judgment. While the court must construe factual allegations in the nonmoving party's favor and treat them as true, however, the court need not treat the complaint's legal conclusions as true. See, e.g., Custer v. Sweeney, 89 F.3d 1156, 1163 (4th Cir. 1996) (court need not accept plaintiff's "unwarranted deductions," "footless conclusions of law," or "sweeping legal conclusions cast in the form of factual allegations") (internal quotations and citations omitted); Estate Constr. Co. v. Miller & Smith Holding Co., 14 F.3d 213, 217-18 (4th Cir. 1994).

III

A. The TC Program.

The First Amendment provides "Congress shall make no law respecting an establishment of religion..." and applies to the states by incorporation into the Fourteenth Amendment. U.S. CONST. amend. I; Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943). The Supreme Court has frequently used the Lemon test when faced with Establishment Clause challenges. Van Orden v. Perry, 125 S. Ct. 2854, 2860-61 (2005); see, e.g., Mueller v. Allen, 463 U.S. 388, 394 (1983). The three prong Lemon test provides: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citation omitted).

However, recognizing that the Lemon factors are mere guideposts, the Supreme Court has occasionally declined to apply the Lemon test and instead focused on the minimum requirements of the Constitution: "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" Lee v. Weisman, 505 U.S. 577, 587 (1992); Hunt v. McNair, 413 U.S. 734, 741 (1973). The only two Circuit Courts of Appeals that have dealt with claims similar to those presented in this case have opted to apply the coercion test instead of the Lemon factors. Warner v. Orange County Dep't of Probation, 115 F.3d 1068, 1074 (2d Cir. 1996); Kerr v. Farrey, 95 F.3d 472, 479 (7th Cir. 1996) ("[W]hen a plaintiff claims that the state is coercing him or her to subscribe to religion generally ... only three points are crucial: first, has the state acted; second, does the action amount to coercion; and third, is the object of the coercion religious or secular?").

In Warner, the Second Circuit applied the coercion test and found that requiring a defendant to attend Alcoholics Anonymous as a condition of his probation violated the Establishment Clause of the First Amendment because of the substantial religious components of the program. Warner, 115 F.3d at 1074-75. Similarly, in Kerr, an inmate complained that he was required to attend Narcotics Anonymous meetings in order to avoid a higher security risk classification and negative effects on his parole eligibility. Kerr, 95 F.3d at 474. The Seventh Circuit, also applying the coercion test, found the program ran afoul of the prohibition against the state's favoring religion over non-religion. Id. at 480.

In Ross v. Keelings, 2 F. Supp. 2d 810 (E.D. Va. 1998), the Eastern District of Virginia

faced a claim that closely resembles the one at hand. In Ross, an inmate claimed he was forced to participate in religious activities as part of the Therapeutic Community Program at the Indian Creek Correctional Center, under threat of loss of good conduct allowances. Ross, 2 F. Supp. 2d at 816. Applying the coercion test, the court found the TC Program at ICCC violated the Establishment Clause as, by a defendant's own admission, the program incorporated religion so that inmates can seek out and find their spirituality. Id. at 818. Religious elements of the program at the time the action arose included a Serenity Prayer, publications referring to God, and the goal of spiritual well-being. Id. at 812-13.

The Eastern District revisited the issue in Nusbaum, where four years later the court held that the TC Program at ICCC continued to violate the Establishment Clause. Nusbaum, 210 F. Supp. 2d at 788. Again using the coercion test, the court found the mandatory program still espoused religion by teaching spirituality and encouraging inmates to turn their lives over to a "higher power." Id. at 788-89. The decision in Nusbaum led Deputy Director John Jabe to circulate a memorandum on September 3, 2002 to all Virginia correctional facilities that house TC Programs, including BCC, requiring changes to align the mandatory portions of the program with constitutional requirements. Terry Aff. ¶ 4, ex. A. Plaintiffs in this action assert the TC Program at BCC still espouses religion in violation of their constitutional rights, despite the changes introduced after Nusbaum. The undersigned disagrees and declines to find that the policy of the Virginia Department of Corrections as it currently stands contravenes any constitutional rights.

Applying the same standard as the Second and Seventh Circuits, the undersigned finds that the allegations of plaintiffs, taken as true, do not rise to the level of a constitutional

violation. As the Supreme Court recently stated in Van Orden v. Perry, 125 S. Ct. 2854, 2863 (2005), "[s]imply having religious content or promoting a message consistent with religious doctrine does not run afoul of the Establishment Clause." While the state has indeed acted, and, admittedly, portions of the TC Program at BCC are mandatory, the TC Program as a whole in no way tends to establish religion in violation of the First Amendment. Rather, references to God or religion in mandatory components of the TC Program are merely incidental and do not infringe on plaintiffs' constitutional rights. In this regard, it is appropriate to focus on the specific complaints alleged by plaintiffs.

Plaintiffs complain religious songs were sung at mandatory meetings and events. Many inmates through their affidavits point specifically to one instance at a talent show where an inmate sang "His Eye Is on the Sparrow." Inmates opine a BCC staff member should have intervened to prevent this song from being sung. While it is doubtless a religious song, this court finds no reason staff should have intervened to prevent its performance. According to defendants, this talent show was not mandatory and inmates could leave if they so desired. Crowder-Austin Aff. ¶ 7; Suttle Aff. ¶ 5. Plaintiffs never allege they were unable to leave the talent show. Under these circumstances, one inmate expressing his religious beliefs through song does not satisfy the coercion test.

Plaintiffs also assert that references to "God" and "spirituality" were made on occasion at mandatory meetings. Plaintiffs complain of verbalization of the word "God" in staff facilitated groups *on more than one occasion*; use of the words "higher power" and "God" *at times* in house meetings; and inmates *giving their understanding* about religious matters in mandatory meetings. Horn Aff 1; Smith Aff.; Hairston Aff. (emphasis added). None of these alleged wrongs, even

considered collectively, is tantamount to a violation of one's First Amendment rights. Tension has always existed between the Establishment Clause and the Free Exercise Clause.[3] See, e.g., Cutter v. Wilkinson, 125 S. Ct. 2113, 2120-21 (2005) (holding RLUIPA does not violate the Establishment Clause). The Supreme Court has held there is room for "play in the joints" between the two clauses of the First Amendment. Cutter, 125 S. Ct. at 2121. The undersigned believes there is space between the Free Exercise Clause and the Establishment Clause for inmates to express their own religious beliefs in substance abuse coping sessions in a way that is not prohibited by the Constitution. Cf. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1(a)(1)-(2) ("No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution.").

Inmates indicate no more than occasional references to God or religion at mandatory events. In their affidavits, inmates use the words "at times" and "on more than one occasion" when referring to how often religious terms are used. Many inmates in their affidavits point to a July 22, 2004 meeting held by Sylvia Martin where religion was discussed. Inmates admit that Martin told anyone who was bothered by religious references that they could be excused, yet the inmates claim only they were "unable to leave the dorm" or "not allowed to leave the building." Blankenship Aff.; Cooper Aff.; Horn Aff. 2. Plaintiffs do not allege that these inmates were unable to leave the room in which the meeting was held. Being incarcerated, inmates surely were prohibited from leaving the building in which they were housed at their leisure. There is, in short, no allegation that inmates were forced to sit in a certain room and listen to a lecture on

[3]The Free Exercise Clause states: "Congress shall make no law...prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

religion.

Plaintiffs also complain that only "positive and religious books and program materials" were available to inmates of the Buck Dorm. Pls.' Decl. 5. Although the library was segregated into religious and secular materials, inmates claim there were still restrictions on what could and could not be read. Id. Assuming inmates in the Buck Dorm were restricted to "positive and religious" materials, such restrictions do not violate First Amendment rights. As plaintiffs state themselves, they had a choice of positive books *as well as* religious books. They were not forced to access only religious materials.

Plaintiffs repeatedly point to the decline of the TC Program as evidence of the infiltration of religion into the mandatory agenda. Plaintiffs argue that the program "lost scores, if not hundreds of members" and insinuate the breakdown was due to members objecting to the religious nature of the program. Pls.' Decl. 5. Plaintiffs also note that a consultant was sent to re-institute the TC Program at BCC. Pls.' Decl. 3. Plaintiffs have not, however, offered any proof that any problems with the TC Program at BCC were due to unlawful intrusion of religion into the program. If, as plaintiffs allege, there was an entire dorm full of noncompliant inmates, it shows nothing more than the fact there were inmates who did not want to participate in substance abuse counseling. Attributing their noncompliance to the minimal religious elements in the program is nothing more than speculation.

There is no material fact in dispute that defendants have taken steps to remove religious aspects from the TC Program in light of the Nusbaum decision. They removed the AA component, separated video and book libraries, and amended motivational readings and thoughts for the day. Staff members instructed inmates that they were allowed to leave meetings that

contained religious elements. The TC Program at BCC appears to strike a constitutionally permissible balance between advancing and inhibiting religion by allowing inmates to express their own religious views without preaching to other inmates. There is no dispute that the purpose of the TC Program is secular. The program aims to help inmates become more in touch with their feelings and express those feelings; develop empathy, communication and listening skills; and establish trust and improve interpersonal relationships. Crowder-Austin Aff. ¶ 5. The program instills pro-social values, employability skills and respect for authority. Id. at ¶ 3. Plaintiffs have not provided evidence that they have been forced to support or participate in religion. Isolated instances where religion is referenced do not rise to the level of rendering the entire TC Program contrary to constitutional standards. In short, none of the wrongs alleged by the plaintiffs, even taken collectively, violates the First Amendment. The TC Program as currently implemented passes constitutional muster.

B. Qualified Immunity.

Additionally, plaintiffs cannot recover monetary damages against defendants in this case because of the doctrine of qualified immunity. Where constitutional issues are involved and an area of the law is unsettled, it is proper to examine whether officials are protected by the doctrine of qualified immunity. When there are no genuine issues of fact, courts are encouraged to deal with qualified immunity defenses at the summary judgment stage so that officials might be spared the burdens of liability and litigation when appropriate. See Pritchett v. Alford, 973 F.2d 307, 313 (4th Cir. 1992) (citing Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982)).

When examining the issue of qualified immunity, a court must (1) identify the specific right allegedly violated; and (2) determine whether, at the time of the alleged violation, the right

was so clearly established that a reasonable person in the official's position would have recognized the illegality of his actions. See id. at 312.

The threshold inquiry in a qualified immunity analysis is whether plaintiffs' allegations, if true, establish a constitutional violation. Hope v. Pelzer, 536 U.S. 730, 736 (2002). Here, the right of inmates not to be coerced into substance abuse programs that espouse religion is at issue. As the court outlined above, the alleged wrongs in this case do not amount to any constitutional violations.

The court must next address whether at the time of the alleged violations this right was so clearly established that a reasonable person in a prison official's position would recognize the illegality of their actions. In order to support a denial of qualified immunity, a court need not point to an already-litigated case involving the same or very similar facts. See Hope, 536 U.S. at 741 ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.") Rather, the question for the court is whether the "contours" of the right have been fleshed out to a degree capable of giving an officer "fair warning" that the action he was preparing to take would violate the constitutional rights of prospective plaintiffs. See id.

When gauging the awareness of an official, courts should look to the decisions of the U.S. Supreme Court, the relevant U.S. Court of Appeals, and the highest state court of the state in which the court sits. Wilson v. Layne, 141 F.3d 111, 114 (4th Cir. 1998). Defendants in this case were arguably aware of the decision in Nusbaum and/or Ross, as staff members enacted changes to the TC Program following the September 3, 2002 memorandum circulated by John Jabe. Terry Aff. ¶ 4. No court has considered the constitutional impact of those changes. As such, defendants had no "fair warning" that their actions may violate the First Amendment.

Even assuming, arguendo, that the right was in fact clearly established, defendants still would be entitled to qualified immunity because defendants' conduct was not such that reasonable persons in defendants' positions would have recognized the illegality of their actions.

Defendants made changes to the TC Program following the September 3, 2002 memorandum and the decision in Nusbaum. The AA component was removed from the mandatory portion of the program. Crowder-Austin Aff. ¶ 7. Two separate libraries were created: one with religious materials and one without. Id. Motivational readings were amended to exclude references to religion. Id. Staff was instructed to allow inmates to express their own religious views as long as it did not amount to preaching. Id. While inmates may have made references to religion at mandatory meetings, any mention of religion was incidental. Therefore, reasonable people in defendants' positions would not have known their actions amounted to a constitutional violation. A good faith effort to comply with constitutional limitations protects all but the plainly incompetent or those who engage in knowing violations of the law. Collinson v. Gott, 895 F.2d 994, 998 (4th Cir. 1990) (Phillips, J., concurring). As such, defendants are entitled to qualified immunity and the undersigned recommends that defendants' motion for summary judgment be granted on this ground as well.

IV

The Clerk is directed to immediately transmit the record in this case to the Honorable Samuel G. Wilson, United States District Judge. Both sides are reminded that pursuant to Rule 72(b), they are entitled to note objections, if they have any, to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become

conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by the reviewing court as a waiver of such objection.

Further, the Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTER: This 9th day of November, 2005.

/s/ Michael F. Urbanski
United States Magistrate Judge